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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AXIOM FOODS, INC., a California
corporation; GROWING
NATURALS, LLC, an Arizona
limited liability company,

Plaintiffs,

v.

ACERCHEM INTERNATIONAL,
INC., an entity of unknown origin;
and ACERCHEM UK LIMITED, a
United Kingdom limited liability
company,

Defendants.

CASE NO. CV15-870 PA (AJWx)

**REPLY IN SUPPORT OF MOTION
TO STRIKE (FRCP 12(f))**

Date: July 6, 2015
Time: 1:30 p.m.
Ctrm: 15

[Hon. Percy Anderson, Courtroom 15]

1 It is very well-established that, in addition to any insufficient defense or
 2 material that is redundant, immaterial, impertinent or scandalous, “[th]e Court may
 3 also strike under Fed.R.Civ.P. 12(f)¹ a prayer for relief which is not available as a
 4 matter of law.” *Susilo v. Wells Fargo Bank, NA*, 796 F.Supp.2d 1177, 1196 (C.D. Cal.
 5 2011) (citing *Tapley v. Lockwood Green Eng’rs*, 502 F.2d 559, 560 (8th Cir. 1974));
 6 *see also Stearns v. Select Comfort Retail Corp.*, 763 F.Supp.2d 1128, 1139 (N.D. Cal.
 7 2010); *Spencer v. DHI Mortg. Co., Ltd.*, 642 F.Supp.2d 1153, 1169 (E.D. Cal. 2009);
 8 *Shabaz v. Polo Ralph Lauren Corp.*, 586 F.Supp.2d 1205 (C.D. Cal. 2008); *Arcilla*
 9 *v. Adidas Promotional Retail Operations*, 488 F.Supp.2d 965, 968 (C.D. Cal. 2007);
 10 *Bureerong v. Uvawas*, 922 F.Supp. 1450, 1479 n.34 (C.D. Cal. 1996).

11 Ignoring this longstanding principle, plaintiffs Axiom Foods, Inc. and Growing
 12 Naturals, LLC (“Plaintiffs”) nonetheless contend that *Whittlestone, Inc. v.*
 13 *Handi-Craft Co.*, 618 F.3d 970 (9th Cir. 2010)—which in fact preceded Judge
 14 Snyder’s above-quoted 2011 *Susilo* decision—somehow prevents the Court from
 15 striking Plaintiffs’ requests for statutory damages, costs and attorneys’ fees, which
 16 are plainly unavailable as a matter of law based on the facts alleged on the face of
 17 Plaintiffs’ Complaint.

18 The Ninth Circuit’s ruling in *Whittlestone* was not so broad, however. In that
 19 case, the court merely ruled that the district court had erred in granting a motion to
 20 strike the plaintiff’s prayer for lost profits and consequential damages, and held “that
 21 Rule 12(f) of the Federal Rules of Civil Procedure does not authorize a district court
 22 to dismiss a claim *for damages* on the basis it is precluded as a matter of law.” *Id.* at
 23 976 (emphasis added). Here, the defendant seeks to strike not a prayer for actual or
 24 consequential damages, but rather for statutory damages, costs and attorneys’ fees.

25
 26
 27 ¹ In the alternative, prayers for unavailable remedies may also be dismissed
 28 pursuant to Federal Rule of Civil Procedure 12(b)(6). *See In re Toyota Motor*
Corp., 790 F.Supp.2d 1152, 1170 (C.D. Cal. 2011); *In re Toyota Motor Corp.*, 754
 F.Supp.2d 1145, 1169–70 (C.D. Cal. 2010). It is respectfully requested that the
 Court instead do so should it be so inclined.

1 *Whittlestone* in no way prevents the Court from doing so.

2 Plaintiffs also suggest that they might possibly later discover one or more
3 additional infringements occurring after the dates of their respective copyright
4 registrations, thus giving rise to possible awards of statutory damages, costs and/or
5 attorneys' fees. If that were ever to occur (which it will not), then Plaintiffs could and
6 should simply seek leave to amend their complaint to add such additional claims and
7 remedies at the appropriate time. Fed. R. Civ. P. 15(a)(2).

8
9 DATE: June 22, 2015

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12 By: /S/
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